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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 178

ILLINOIS COMMERCE COMMISSION, AND JOHN D. BIGGS, WILLIAM PARRILLO, FRANK PESKA, EDWIN A. ROSENSTONE, AND VAL J. WASHINGTON, INDIVIDUALLY AND AS MEMBERS OF AND CONSTITUTING THE ILLINOIS COMMERCE COMMISSON; DWIGHT H. GREEN, INDIVIDUALLY AND AS GOVERNOR OF THE STATE OF ILLINOIS; GEORGE F. BARRETT, INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE STATE OF ILLINOIS; THOMAS J. COURTNEY, INDIVIDUALLY AND AS STATE'S ATTORNEY OF COOK COUNTY, ILLINOIS; HARRY A. HALL, INDIVIDUALLY AND AS STATE'S ATTORNEY OF LAKE COUNTY, ILLINOIS; LEE E. DANIELS, INDIVIDUALLY AND AS STATE'S ATTORNEY OF DUPAGE COUNTY, ILLINOIS; CHARLES G. SEIDEL, INDIVIDUALLY AND AS STATE'S ATTORNEY OF KANE COUNTY, ILLINOIS, AND WILLIAM M. CARROLL, INDIVIDUALLY AND AS STATE'S ATTORNEY OF MCHENRY COUNTY, ILLINOIS,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY, A CORPORATION,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

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THE DONNELLEY-GARDEN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

Subject Index.

PAGE

Introduction 1-3

Argument—

I. Nothing in the earlier orders in the proceedings in which the instant order was entered either excuses or supplies the want of findings of a change in conditions justifying an increase in rates 3, 4

II. The legislative character of the order in question did not and could not dispense with the constitutional requirement that administrative orders must be supported by findings of fact 4-8

III. The recitals in the present order and in the supplemental report are insufficient to sustain the order 9, 10

IV. The present order is subject to collateral attack by the appellants in the present proceedings 10-12

V. Notwithstanding the plaintiff's argument to the contrary, the only effect of the order, even if valid, is to assent to the increase of rates but not to supersede the jurisdiction of the State Commission 12, 13

VI. Contrary to appellee's contention, the present proceeding does not involve any question of appellee's right to relief independently of the order of the Interstate Commerce Commission 14-16

VII. Sundry observations 16, 17

Conclusion 17

Table of Cases.

Atchison Ry. Co. v. United States, 295 U. S. 193 7
Natural Gas Co. v. Slattery, 302 U. S. 300 15
The New England Divisions Case, 261 U. S. 184 5
Panama Refining Co. v. Ryan, 293 U. S. 388 8
St. Joseph Stockyards Co. v. United States, 298 U. S. 38 6
State of Florida v. United States, 282 U. S. 194 ..... 7, 9
Transit Commission v. Long Island Ry. Co., ... 12
United States v. Chicago, M., St. P. & P. R. Co., 294 U. S. 499 ..... 7, 9

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APPELLANTS' BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

Appellee's motion to dismiss this appeal or to affirm the determination of the lower court is founded upon certain premises which may be concisely but nevertheless

very fairly stated in the form of the following propositions:

First: That because the order of January 21, 1942, sanctioning a ten per cent increase in interstate and intrastate passenger fares was entered in continuation of a proceeding initiated in 1925, at which time the Inter-State Commerce Commission first assumed and exercised jurisdiction over the rates in question, and because appellants do not challenge the sufficiency of the findings of fact in the orders of 1925 and 1936, the recitals in the earlier orders must be deemed sufficient to support—*not* the rates fixed in 1925 and 1936 alone—but also a *higher* schedule of rates fixed in 1942.

Second: That the "legislative character" of the order in question *exempts* it from the basic requirement of due process of law that administrative orders must be supported by specific findings; that is to say, that because (as this court has repeatedly held and as appellants concede) an order intended to be general in the scope of its application may be based on "average", "generally prevailing", "common", or "ordinary" conditions and because the Commission admittedly not only need not but could not find the facts with respect to each particular rate affected, the Interstate Commerce Commission may therefore not only dispense with the finding of facts peculiar to each rate involved, but may dispense with the findings even as to the "average" or "generally prevailing" conditions which must justify the order if it can be justified at all.

Third: That in any event the order, together with recitals in the report of March 2, 1942, does contain findings sufficient to support its provisions.

Fourth: That, notwithstanding this court's repeated pronouncements that an order not supported by findings of fact is unconstitutional, null and void, appellants may not defend against such an order upon the ground of such unconstitutionality because, as appellee contends, the order is invulnerable to "col-

lateral attack" even on the grounds of its unconstitutionality.

Fifth: That the order is not only valid but is mandatory and not not merely permissive.

Sixth: That the injuction must be sustained, independently of the order of the Interstate Commerce Commission, because the rates in force prior to March 8, 1942, were confiscatory in character.

We shall briefly reply to each of the contentions above summarized in the order indicated.

I.

Nothing in the Earlier Orders in the Proceedings in Which the Instant Order Was Entered Either Excuses or Supplies the Want of Findings of a Change in Conditions Justifying an Increase in Rates.

Appellee seeks to integrate the present order with the Commission's 1925 order (Exhibit A attached to the complaint) and its 1936 order and to derive from the findings embodied in these earlier orders support for the order now under consideration.

Let it be assumed that the 1925 and 1936 orders were based upon proper recitals of sufficient fact. But manifestly those facts justified those orders—not the present order. Recitals of findings that one state of facts existed in 1925 and that another state of facts existed in 1936 do not amount to findings that a *different* state of facts exists in 1942.

Appellants do not contend that the present order may not properly refer to previous orders as bearing upon the situation of the carriers at the time that those orders were entered. But clearly those findings justify the rates fixed years ago—*not* a change or increase in those rates. We shall not further protract our argument that findings

made over sixteen years ago and over five years ago, respectively, justifying a rate schedule at that time, do not and cannot justify an increase in that schedule in 1942.

Therefore the appellants contend that the order of January 21, 1942, is invalid for want of sufficient findings of fact.

II.

The Legislative Character of the Order in Question Did Not and Could Not Dispense With the Constitutional Requirement That Administrative Orders Must Be Supported by Findings of Fact.

Appellee argues that because orders of the kind here involved are frequently and, in the sense intended, correctly referred to as "legislative" in character, such orders need not embody specific findings of fact. As we shall point out a little later in this brief, an examination of the very cases relied upon by the appellee, as well as the consideration of other pertinent decisions, makes it clear that, directly contrary to the argument in support of which appellee's cases are cited the rule is that "legislative" powers can constitutionally be delegated to an administrative agency *only upon the condition that the agency find and recite the factual basis for the exercise of the delegated powers;* and that the facts must not only be found but recited in order to impart validity to "legislative" commands of executive agencies.

But before considering the applicable authorities, the appellants wish to make the following important, preliminary observations:

The appellee is quite correct in contending that since the transportation act of 1920, the Commission may—and obviously must—base its general orders upon a broad view of the general situation of the carriers against a perspective of the national economy. The Commission

need not and, indeed, cannot find or make in such a general order a "reasonable rate" for each carrier in the country as to each commodity transported or each passenger service rendered between each point of origin and destination. The Commission may and perhaps must predicate its general order, comprehensive in scope, upon a "law of averages" and upon common, ordinary, or generally prevailing conditions, reserving jurisdiction to correct by appropriate specific orders particular inequalities as to particular rates. (The *New England Divisions case*, 261 U. S. 184.)

Now, as we shall show by the authorities, this merely means that the Commission may find facts as to general, common or average conditions. But, as the cases indicate, it does **not** mean that conclusions may be substituted for facts, even if the facts themselves are those of an average, general or common situation. In other words, the Commission might, indeed, find the general or average proportion of passengers to freight traffic and the general or average proportion of expense of labor, other operating costs, depreciation, capital expenditure and other factors attributable to different kinds or classes of service, frankly recognizing the possibility or even the certainty of individual hardship and reserving jurisdiction to correct such hardship by specific order.

But the basis of a rate schedule, even if generalized by averages, is none the less a *factual* basis. If, for example, such specific items as labor cost, the cost of maintenance, depreciation, and the like have increased by, let us say, ten per cent on the average, that **average** increase is as much a fact as would be the increase in cost of a particular haul by a particular carrier.

The *facts*—even if they are "*average*" facts—should be found; and a mere pronouncement that rates are "reasonable", "fair", or "just", or that they are

"necessary to enable petitioners to continue to

render adequate and efficient railway transportation service",

or that

> "the passenger service justly and reasonably should contribute to meeting the added operating cost of the railroad"

is a conclusion, whether these opinionative terms are applied to a single rate or to all of the rates in the country.

A case cited by the appellee in support of its contention that orders "legislative" in character need not be supported by specific findings but actually directly hostile to that contention is *St. Joseph Stockyards Co.* v. *U. S.*, 298 U. S. 38. That case is a leading one upon the "legislative character" of administrative orders fixing rates. It is pointed out in no uncertain terms that where Congress directly and immediately enacts a command, such as the establishment of a rate schedule,

> "its determinations are conclusive",

but the case further holds, no less clearly, that Congress may delegate legislative powers *only provided that the exercise of such power is conditioned upon an administrative "finding of facts"*.

The court said at page 51:

> "When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make **findings of fact** which are conclusive, **provided the requirements of due process which are specially applicable to such an agency are met**, as in according a fair hearing and acting upon evidence and not arbitrarily. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Virginia Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, *supra*, p. 444; *Florida* v. *United States*, 292 U. S. 1, 12." (Emphasis supplied.)

Incidentally, it is interesting to contrast the findings in that case with those in the present case. The court said at page 46:

> "The findings are elaborate. They include detailed findings with respect to the services rendered by appellant and its rates, the used and useful character of appellant's property, the valuation of used and useful land, the value of appellant's structures on the basis of cost of reproduction new less depreciation, working capital, going concern value, fair value on the basis of the facts found, fair rate of return, reasonable operating expenses (including repairs, depreciation and taxes), necessary revenue and volume of business."

No such recitals are to be found in the presen. order.

To maintain service the carrying rates, both interstate and intrastate, must be adequate; but the adequacy of the rates must be ascertained from a *factual* basis. Such rates must be equitably proportioned among the classes of traffic; and equitable proportion requires a determination of facts.

The appellee attempts to distinguish the following cases cited by the appellants in their original brief.

State of Florida v. *U. S.*, 282 U. S. 194.

U. S. v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

Atchison Ry. Co. v. *U. S.*, 295 U. S. 193.

The basis upon which the appellee undertakes to discriminate these cases from the instant case is that in the cases cited the orders in question were not general orders, national in scope. But no authority cited by the appellee and no sound reason advanced in his brief suggests that although the Commission may *not* increase a particular rate without making findings, it *may* impose upon the traveling public a blanket ten per cent increase in passenger fares effective throughout the country with only such

generalities and conclusions as pronounce the new rate "necessary", "fair", "just", or "reasonable". As the cases cited above hold, these adjectives merely sum up the Commission's opinion or conclusion. No facts are stated to support the above conclusions. As has been pointed out (Appellants' Original Statement) the courts have repeatedly held that such findings are insufficient to support an order of the character here in question.

We have carefully examined each of the authorities cited by the appellee in his brief. Not one of them declares, either directly or by intimation, either by way of holding or by way of *dictum*, that the Interstate Commerce Commission may exercise "legislative" faculties in ordering a general increase in rates without making adequate findings.

On the contrary, in the case of *Panama Refining Co. v. Ryan*, 293 U. S. 388, cited by the appellants in their original statement, the order in question was promulgated by the President and was intended to effectuate a policy national in scope, having for its object the vitally important conservation of oil and petroleum products. So far as the generality of the purpose of this order was concerned, the order there was similar to the order here. Yet the Supreme Court held the order unconstitutional for want of sufficient findings.

The appellants therefore submit that the appellee's arguments are not sufficient to sustain the premise that an order, even though "legislative" in character and general in nature, is valid when not supported by sufficient findings of fact.

III.

The Recitals in the Present Order and in the Supplementary Report Are Insufficient to Sustain the Order.

Under Point I of this statement it was submitted that the findings and recitals in the orders of 1925 and 1936 cannot sustain the order entered in 1942. Under Point II of this statement it was shown that neither authority nor reason exempts an order from the requirement of due process that it be supported by sufficient findings of fact merely because the order is general in scope. If appellants are correct in their contention that the present order must be supported by adequate findings, the question arises as to whether that requirement is met in the instant case.

We shall not repeat at length the matter developed under Point I of the argument in support of our original statement as to jurisdiction. Under that Point it was clearly demonstrated that mere pronouncements that rates are "reasonable", or "unreasonable", "fair" or "unfair", "just" or "unjust", or "necessary" or "unnecessary", are insufficient. *State of Florida* v. *United States*, 282 U. S. 194. *U. S.* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499.

If the increase in rates is justified at all, its justification must be found in a comparison of such data as the following: the estimated increase in the cost of operation of the nation's railroads for both freight and passenger traffic, on the one hand, and on the other hand the augmentation of revenues due to the increase of freight and passenger traffic; a fair and reasonable allocation of the total expense of operation between passenger and freight traffic; a fair and reasonable allocation of the total expense of operation between interstate and intrastate commerce; and other facts, a consideration and estimation of which is re-

quired by the fundamental principles of public utility economics.

As we have previously pointed out (*this statement, ante*, Point II), appellants do not contend that the Commission either could or should have made particular findings as to each particular haul of each particular kind of freight for each particular carrier in the country, but as we have also pointed out, any increase in rates must have its basis in facts, and such facts must be found in the recitals of the order.

Unless the Commission acted upon facts and figures, even if the facts and figures were those of a general average, the order is arbitrary and capricious; and *if* the Commission acted on such facts, they should have been recited in the order.

For the reasons already urged in appellants' original statement, appellants contend that the order in question does not meet the constitutional requirement of due process that administrative regulation must in all cases and without exception be predicated upon the finding of the facts justifying the regulation.

IV.

The Present Order Is Subject to Collateral Attack by the Appellants in the Present Proceedings.

At various points in his brief, appellee conducts an adroit and skillful argument that the appellants may not in the present proceedings challenge the validity of the order upon which appellee relies.

Appellee points out that the cases cited by appellants were injunction proceedings in which it was sought to restrain the enforcement of orders of the Interstate Commerce Commission or other agencies and seeks upon that ground to distinguish those cases from the instant cause.

There are two replies to appellee's argument: in the first place, it is well understood that a "direct attack" upon an order or judgment as distinguished from a collateral attack, is an attack upon it in the proceeding in which it is entered or in some continuation thereof, as, for instance, upon a statutory review in the nature of an appeal from or a writ of *certiorari* to a commission or court making the order; and that a collateral attack is an attack in an independent proceeding wherein the order is assailed as absolutely void.

Each of the cases cited by appellants was an independent equity proceeding, and to that extent, at least, similar to the present proceedings.

The cases cited by appellee as observing a distinction between what appellee calls "direct attacks" and "collateral attacks," as appears from appellee's own synopsis of the bearing of the cases which he cites, is that in proceedings to which the Interstate Commerce Commission is not a party the court will not review the *evidence* to determine whether such *evidence* supports the *findings*. Admittedly the evidence upon which the present order was based is not and could not properly be in the record in the instant cause.

But in the case of *U. S.* v. *Chicago, M., St. P. and P. R. Co.*, 294 U. S. 499, it was held that evidence will not take the place of findings (see page 504); and the court further declared on the same page that

> "an order of the Interstate Commerce Commission is *void*"

unless supported by proper findings.

If, as appellants contend, the order is unconstitutional for want of proper findings, it is absolutely void—a complete nullity. Of course, an order which is absolutely void on its face is always subject to collateral attack.

In the *second* place, appellee's argument, when properly

analyzed, amounts to the remarkable proposition that even though equity would *enjoin* the exercise of the present order in the suit brought for that purpose, it will nevertheless enforce and give effect to that order by affirmative injunction in the suit of these plaintiffs, and that the defendants are precluded from resisting negatively and by way of defense the effect of the present order because they have not affirmatively asked to have it enjoined.

The sophistry of this argument is best exposed by a clear statement of the argument itself.

V.

Notwithstanding the Plaintiff's Argument to the Contrary, the Only Effect of the Order, Even If It Is Valid, Is to Assent to the Increase of Rates But Not to Supersede the Jurisdiction of the State Commission.

The plaintiff's criticism of the decision of the New York Supreme Court in the case of *Transit Commission* v. *Long Island Ry. Co.*, (plaintiff's original brief, Appendix B), is premised upon several arrant fallacies.

In the first place, the plaintiff correctly says at page 24 of his brief:

> "Under our system of dual sovereignities, where Congress through its agency, as here, has taken action, the legislative field is occupied exclusively by the federal authority, leaving the state without any power at all."

This premise is correct, but it proves too much. It begs the question of whether the Commission has in fact commanded the increase of rates. But it *refutes* the plaintiff's contention that federal sanction to the increase in question was unnecessary; for if by its 1925 and 1936 orders the

Commission has exclusively occupied the field. In the language of appellee,

> "there is no room left for action by the state whether it be conflicting or concurring action."

Then, according to the reasoning of appellee's counsel at this point, but contrary to his reasoning elsewhere, the consent or sufferance of the Commission *is* necessary before the state commissions can act.

At page 26 of his brief the plaintiff argues that to accede to the construction given this order by the New York court would be to

> "nullify * * * a substantial portion of it."

Of course this statement again begs the question of whether it was the effect of the order to *authorize* or merely *assent* to the increase in rates. If, as the defendants contend and as the New York court held the latter, is the true purport of the order, then the New York decision does not nullify but merely gives effect to the order according to its terms.

We shall not rehearse the careful reasoning of the opinion of that case, nor shall we repeat the substance of our argument upon the question of the construction of the order. (Appellants' Original Statement, Point II.)

We again remind the court, however, that had the Commission intended to command and render obligatory the ten per cent increase in passenger fares, almost certainly it would have used mandatory, not merely permissive, language, and it would have made the findings of fact required for an order so far-reaching and drastic in its effect.

VI.

Contrary to Appellee's Contention, the Present Proceeding Does Not Involve Any Question of Appellee's Right to Relief Independently of the Order of the Interstate Commerce Commission.

Appellee argues under Point X of his statement that the fares sought to be established by appellants were properly enjoined

> "because of their clearly established confiscatory character and quite independently"

of the order of the Commission. The plaintiff's complaint could not and was clearly not intended to precipitate any question of the confiscatory character of the former rates or of the plaintiff's right to relief from such confiscation, apart from the opposing authority of the order now in question.

The complete irrelevance of appellee's attempt in this court to treat the proceeding in the lower court as one for relief from confiscation, apart from the effect of the Interstate Commerce Commission's order can be shown in a very few words.

The complaint made absolutely no showing that the plaintiff had ever petitioned the Illinois Commerce Commission for the increase in rates here sought upon the ground that the antecedent rates were confiscatory. Although the complaint does contain some allegations that the service in question is operated at a loss, it does not intimate or hint that the plaintiff ever made or offered to make any such claim before the Commission or that he resisted the order which he now seeks to enjoin on any ground other than the ground that it was in conflict with the order of the Interstate Commerce Commission.

As absolutely conclusive that appellee could not have

litigated in the lower court and cannot litigate in this court any question of confiscation, appellants cite the decision of this court in *Natural Gas Co.* v. *Slattery*, 302 U. S. 300. In that case the Illinois Commerce Commission entered an order requiring a utility to produce certain books and records in connection with an investigation of an affiliated company. The utility, protesting that it was not subject to the jurisdiction of the Illinois Commerce Commission and that the books requisitioned were so voluminous that a compliance with the order would constitute an unconstitutional invasion of its property rights, sued to enjoin an enforcement of the order. The utility failed to show that after the order was entered, it had assailed it before the Commission upon the grounds asserted in the suit in the federal court. The court said at pages 309 and 310:

> "We have no occasion to consider the merits of these objections. It suffices to say that the statute itself provides an adequate administrative remedy which appellant has not sought. By §§ 64 and 65 of the Act the commission was authorized on its own motion or on application of appellant to order a hearing to ascertain whether the present order was 'improper, unreasonable, or contrary to law.' Section 67 authorizes the commission at any time, upon proper notice and hearing, to 'rescind, alter or amend any * * * order or decision made by it.' We see no reason, and appellant suggests none, for rejecting the trial court's ruling that the commission, if asked, could have modified its order, or for concluding that the commission was without authority to suspend or postpone the date of the effective operation of the order so as to avoid the running of penalties, pending application for its modification. *Porter* v. *Investors Syndicate*, 286 U. S. 461, 470; 287 U. S. 346."

In this case, neither before nor after the order was entered did the appellee make any objection to it on the ground that, apart from the order of the Interstate Com-

merce Commission of 1942, the rates imposed by the Illinois Commission were confiscatory. There is no intimation that the Commission would not have entertained such a contention and have determined it fairly and fully.

It is not deemed necessary to cite other authorities to the effect that a utility cannot in the first instance visit upon a court of equity the duty of increasing a schedule of rates before exhausting administrative relief.

VII.

Sundry Observations.

Appellee imputes to appellants and then replies to various contentions which appellants do not make. It is deemed necessary very briefly to correct the distortion of appellants' original argument which results from appellee's misapprehension of its substance.

Appellee labors his argument that the Interstate Commerce Commission has jurisdiction not only over interstate fares but over intrastate fares to the extent necessary to compel intrastate commerce to bear its fair proportion of the burden of all commerce and to the extent necessary to prevent discrimination against interstate commerce. Appellants do not for a moment dispute this well settled proposition. Appellants admit that if the present order were justified by facts and if those facts were properly found, it would represent an entirely valid exercise of the Commission's power.

Appellee also argues that if it was necessary to raise interstate passenger rates by ten per cent, "simple arithmetic" (in the language of the appellee) "is sufficient to demonstrate that it was necessary to raise intrastate rates by the same percentage in order to preserve the proportions of the rate structure." Of course this is true. Ap-

pellants maintain, however, that neither interstate rates nor intrastate rates could be validly increased without proper findings of fact. Appellants contend that the entire order, so far as it affects passenger rates, is invalid; however, they had no occasion to resist the order as applied to interstate rates because appellee sought an injunction against them with respect to no rates other than those which were intrastate.

CONCLUSION.

For the reasons set forth in appellants' original statement, and in this reply, appellants respectfully submit that the questions presented by this appeal are substantial, and pray that the appellee's motion to dismiss the appeal or affirm the decision of the lower court be denied, and that this appeal be fully considered upon its merits.

Respectfully submitted,

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